Editor's note; appealed -- aff'd, sub nom. Alexander v. Watt, Civ.No. 82-0231 (D.D.C. May 15, 1984); also appealed -- aff'd, sub nom. Kennett v. Watt, Civ.No. 82-0250 (D.D.C. May 15, 1984)

ROBERT D. ALEXANDER
PAUL D. KENNETT

IBLA 81-964
81-996 Decided October 26, 1981

Appeals from decisions of the Utah State Office, Bureau of Land Management, rejecting simultaneous oil and gas lease applications U 47839 and U 47842.

Affirmed as modified.

1. Oil and Gas Leases: Applications: Generally -- Oil and Gas Leases: Applications: Attorneys-in-Fact or Agents
An oil and gas lease application, form 3112-1 (June 1980), is not properly completed in accordance with regulation 43 CFR 3112.2-1 and the instructions on the application itself where questions (d) through (f), dealing with parties in interest other than those elsewhere disclosed, assignments violative of 43 CFR 3112.4-3, and multiple filing violative of 43 CFR 3112.6-1, are left unanswered.

APPEARANCES: Bruce A. Budner, Esq., Dallas, Texas, for appellants.

OPINION BY ADMINISTRATIVE JUDGE HENRIQUES

Robert D. Alexander and Paul D. Kennett appeal separate decisions of the Utah State Office, Bureau of Land Management (BLM), dated July 28, 1981, rejecting their individual simultaneous oil and gas lease applications filed in the November 1980 drawing. Each application was drawn with first priority; that of Alexander for parcel UT 28, given serial number U 47839; that of Kennett for parcel UT 31, given serial number U 47842. BLM rejected the applications because each had not been completely executed as required by 43 CFR 3112.2-1.

Because of the similarity of issues and identical statements of reasons, the Board, sua sponte, has consolidated the appeals for consideration.

Appellants' applications were executed, signed, and submitted on behalf of each by an officer of the Federal Energy Corporation (FEC), a filing service for simultaneous oil and gas lease applications. Examination of appellants' applications reveals that questions (d) through (f) on the reverse side of each card were not answered. BLM's decision states in part:

> The attached offer to lease is rejected in its entirety [because the] * * * Offeror failed to execute the simultaneous oil and gas lease application by not completing items (d) through (f) on the reverse side and by failing to properly sign the application (43 CFR 3112.2-1). Vincent M. D'Amico, Walt C. Stempel, 55 IBLA 116 (June 3, 1981).

The applicable regulation at 43 CFR 3112.2 and 3112.2-1, states in part:

> § 3112.2 How to file an application.
>
> § 3112.2-1 Simultaneous oil and gas lease applications.
>
> (a) An application to lease under this subpart consists of a simultaneous oil and gas lease application on a form approved by the Director, Bureau of Land Management, completed, signed and filed pursuant to the regulations in this subpart. [Emphasis added.]

The application form clearly contemplated that items (d) through (f) would be checked on the application itself. Indeed, the introductory words to items (a) through (g) are as follows: "UNDERSIGNED CERTIFIES AS FOLLOWS (check appropriate boxes)" (italics in original). Small boxes appear following each item to be checked in response. Although the application does contemplate that the names of other parties in interest or amendments to one's previously filed statement of qualifications may be submitted by attachment, the questions posed by items (d) through (f) are distinct issues.

Questions (d) through (f) are included in a list of questions on the application dealing with the applicant's qualifications to hold a lease and deal particularly with the circumstances of the execution of the application. The questions relate directly to the qualifications of the applicant to receive a lease. The failure to disclose a party in interest to the lease application (question (d)) is a violation of the regulation at 43 CFR 3102.2-7, the assignment of an interest in the lease offer (question (e)) prior to lease issuance or lapse of 60 days after determination of priority is a violation of 43 CFR 3112.4-3, and any interest of the applicant in more than one application for the same parcel (question (f)) disqualifies the applicant under 43 CFR 3112.6-1(c).

Appellants contend that it is not essential that questions (d) through (f) be answered directly on the drawing entry card itself. Each asserts that BLM acted arbitrarily, capriciously, and in abuse of its discretion by refusing to accept as valid his responses to the questions, which FEC allegedly submitted on an attachment to his application. Copies of the attachments submitted with the brief on appeal contain a statement that FEC is authorized to sign applications for appellant, followed by statements and questions that are substantially similar to those on the drawing entry card. 1/ Each appellant answered "no" to each of questions (d) through (f), and then signed and dated the attachment. Thus, their answers seemingly would have qualified them to hold a Federal lease of this sort had they been entered on the application itself.

Appellants assert that questions (d) through (f) are incorporated into the application for the purpose of assuring compliance with 43 CFR 3112.2-1(f), which states: "No person or entity shall hold, own or control any interest in more than one application for a particular parcel." Each argues that subsection (f), unlike the other subsections of 43 CFR 3112.2-1, does not specify that information relating to that subsection must be included on the application card itself. The actual requirement of disclosure of that information, each asserts, is found in 43 CFR 3102.2-7(a), which states:

> The applicant shall set forth on the lease offer, or lease application if leasing is in accordance with subpart 3112 of this title, or on a separate accompanying sheet, the names of all other parties who own or hold any interest in the application, offer, or lease, if issued. [Emphasis added.]

Appellants argue that the regulations themselves imply that an application card can be "completed" by attaching to it information answering these three questions. Each argues that the regulations cannot reasonably be read as forbidding the applicant to show the nonexistence of other interests in an application or lease in the same manner in which he would show the existence of other interests, viz., on a separate attached sheet.

1/ The addendum's contents are set forth in Janet A. Rodgers, 58 IBLA 275 (1981), and Clyde K. Kobbeman, 58 IBLA 268, 88 I.D. (1981). Although appellants assert the statement was filed with the application, such a statement is not found in either case file where it should be located if filed with the application. See H. S. Rademacher, 58 IBLA 152, 88 I.D. (1981). The statement submitted with appellant Alexander's brief could hardly have been attached to the application in the Nov. 1980 drawing as it was executed Feb. 10, 1981. This Board has noted in previous similar cases that the practice of FEC of filing this statement together with a copy of the agency agreement between the applicant and FEC in advance of the drawing casts doubt on whether the statement was actually attached to the application. Clyde K. Kobbeman, supra.

We do not agree with appellants' interpretation of the regulations as they apply to simultaneous lease application cards. While it is true that subsection (f) of 43 CFR 3112.2-1 does not expressly require checking the appropriate box, any reasonable construction of the regulations would require that subsection to be read in the context of the whole section of which it is a component. And as noted above, in stating what must be done with the application card in order for it to constitute an application to lease, subsection (a) expressly demands completion of the card.

The information required under items (d), (e), and (f) is part of the certification of qualifications required of all applicants for oil and gas leases. This certificate of qualifications is applicable only to the application for which it is made. The certification must be made on all applications for lease and can neither be provided by attachment nor incorporated by reference. See Clyde K. Kobbeman, supra. The rationale for requiring a separate certification for each lease application is demonstrated by the statements attached to the briefs on appeal in these cases. The statement of appellant Alexander is dated February 10, 1981, long after the lease application was made and the drawing was held, and could thus hardly be held to apply to the lease application under appeal. The date of the statement submitted with the brief for appellant Kennett is July 5, 1980, and is clearly not contemporaneous with the lease application. A distinction must be drawn between the certification as to qualifications, including items (d), (e), and (f), which is made by signing the lease application, and supplemental evidence required to establish the qualifications of applicant (e.g., statement of corporate qualifications, copy of agency agreement) which may be incorporated by reference under 43 CFR 3102.2-1(c). See Clyde K. Kobbeman, supra.

Our conclusion clearly is consistent with the case appellants cite in support of their argument that BLM's decision was arbitrary and capricious, Brick v. Andrus, 628 F.2d 213 (D.C. Cir. 1980). In that case the court reversed a decision of the Board that had rejected a winning entry card because Brick had not entered his name on the card in the order indicated by the card's instructions. The court found two reasons to reverse: First, the Department's regulations in effect at that time contained nothing indicating that the application cards needed to be completed precisely as specified on the card, nor had case precedent been presented that supported this requirement. From this the court concluded that Brick had been denied adequate notice. Second, the court found the Board's disposition of Brick's appeal to be inconsistent with an earlier Board decision in which "neither the BLM nor the IBLA [had] considered the offeror's failure to enter his name in the proper order to be reason for disqualifying his offer." Id. at 216. The court held that "where the Secretary has not in the past consistently disqualified entry cards which do not strictly comply with a particular instruction on the entry card, he may not now disqualify an

offer solely on the ground that it did not comply with that instruction." Id. at 217.

The court's holding was very narrow and does not apply to the facts of the instant case. In Brick the information (i.e., the name) did indeed appear on the application card, but in a nonconforming order. In contrast, appellants' application cards did not contain the required information. However, even assuming the applicability of Brick to these facts, the court clearly stated that absent the two flaws discussed above, "the Secretary can properly adopt per se rules if he deems them useful in the administration of the program -- even rules the application of which may at times yield results that appear unnecessarily harsh." Id. at 216. These flaws do not exist here because the Department's regulations and the Board's decisions do provide the necessary notice and consistency with respect to the strict requirement that application cards be "completed,"
i.e, that the information be provided on the cards themselves. See, e.g., Janet A. Rodgers, supra; Edward Marcinko, 56 IBLA 289 (1981); John L. Messinger, 45 IBLA 62 (1980). The court also expressly stated that the phrase "signed and fully executed," which appeared in the 1979 version of 43 CFR 3112.2-1(a) (which is very similar to "completed, signed and filed," contained in the present regulation), "may be reasonably construed as requiring responses to all information blanks on the entry card, as IBLA decisions have done * * *." Brick at 216 n.8.

Appellants also argue that requiring the particular information to be entered upon the card itself is arbitrary and capricious because it serves no purpose in BLM's processing of simultaneous applications that would not be served by allowing this information to be submitted on addenda. For the reasons stated in Janet A. Rodgers, supra at 278, and Clyde K. Kobbeman, supra at 273, we reject this argument. In response to another of appellants' arguments we note that even though other BLM state offices in the past may have improperly accepted filings similar to theirs, such action by BLM employees does not constitute the inconsistency of final Departmental action that concerned the Brick court, and it does not change the disposition of the instant case. 43 CR 1810.3(a); Clyde K. Kobbeman, supra at 273.

Although it is inconsequential to our disposition of this case, it is necessary to modify BLM's decision with respect to its second independent ground for rejecting the application, namely, the conclusion that the appellants had failed to properly sign the applications as prescribed in 43 CFR 3112.2-1(b). Our review of the case file discloses that the holographic signature of an authorized FEC employee complies with the example stated in the regulation, and therefore suffices.

Accordingly, pursuant to the authority delegated to the Board of Land Appeals by the Secretary of the Interior, 43 CFR 4.1, the decision appealed from is affirmed as modified.

Douglas E. Henriques
Administrative Judge

We concur:

James L. Burski
Administrative Judge

C. Randall Grant, Jr.
Administrative Judge.